IS FREE SPEECH COMPATIBLE WITH HUMAN DIGNITY, EQUALITY, AND DEMOCRATIC GOVERNMENT: AMERICA, A FREE SPEECH ISLAND IN A SEA OF CENSORSHIP?

James M. Boland[*]

ABSTRACT

The American model of free speech jurisprudence is based upon the absolutist language of the First Amendment – Congress shall pass no law abridging freedom of speech. This model is unique in the Western world and glaringly contrasts with free speech models in Britain and Canada – examples of which I have labeled the European Model. This Article examines these models and the foundations and presuppositions of both, and the extent to which Canada and Britain, in applying the European Model, protect or fail to protect their citizens' freedom of expression. Is one model moving toward totalitarianism while pretextually asserting it is standing for human dignity, equality, and democracy? This Article answers that question.

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* James M. Boland is an Associate Professor of Law at Regent University School of Law in Virginia Beach, Va.

INTRODUCTION

"The death throes of free speech in Europe have already begun."[1] The bright light of freedom of speech is fading throughout what used to be known as Western Christendom, dimming inexorably before a pretextual and pernicious tide of human dignity, equality, and democratic government.[2] Professor Jonathan Turley writes that

> [f]ree speech is dying in the Western world. While most people still enjoy considerable freedom of expression, this right, once a near-absolute, has become less defined and less dependable for those espousing controversial social, political or religious views. The decline of free speech has come not from any single blow but rather from thousands of paper cuts of well-intentioned exceptions designed to maintain social harmony.[3]

Free speech jurisprudence is broadly divided between an absolutist viewpoint based on individual autonomy,[4] and a more open-ended viewpoint in which freedom to speak what one wants is circumscribed and balanced against a human rights understanding designed to protect government-defined equality, democracy, and human dignity.[5] Britain and Canada are examples of Western countries whose free speech jurisprudence (i.e., the extent of permissible free expression without government restriction) is based on a balance between free expression and its effect on equality, dignity, and civility.[6] This viewpoint will be referred to as the European Model. Free speech jurisprudence in the United States has a measure of both viewpoints, with the absolutist viewpoint, for the most part, in ascendancy.[7] While recognizing that there are exceptions, free

1. Elisabeth Sabaditsch-Wolff, Bürgerbewegung Pax Europa, The Death Throes of Free Speech in Europe at the International Civil Liberties Alliance Brussels Conference, Int'l Civ. Liberties Alliance (July 9, 2012) (transcript available at http://www.libertiesalliance.org/2012/07/13/the-death-throes-of-free-speech-in-europe/).

2. RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 8–11 (2006).

3. Jonathan Turley, *Shut Up and Play Nice: How the Western World is Limiting Free Speech*, WASH. POST, Oct. 12, 2012, http://articles.washingtonpost.com/2012-10-12/opinions/35499274_1_free-speech-defeat-jihad-muslim-man.

4. KROTOSZYNSKI, *supra* note 2, at 8.

5. *See id*. at 9.

6. *See id*. at 187.

7. *See id*. at 8.

speech jurisprudence in the United States will hereinafter be referred to as the American Absolutist Model.

In the United States, the starting point in determining how free citizens are able to speak their minds is the language of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech."[8] The words convey an absolutist message that on its face appears to brook no exceptions.[9] Justice Cardozo explained this foundational view of the First Amendment, stating "[freedom of expression] is the matrix, the indispensable condition, of nearly every other form of freedom."[10]

Unlike in Canada and other Western countries, free speech in the United States has been premised on the concept of "individual autonomy"[11] and the Holmesian theory of a free marketplace of ideas.[12] "The 'marketplace of ideas' metaphor, coined by English philosopher John Milton in 1644, and later used by John Stuart Mill, was initially meant as a call for truth."[13] Milton believed that just as conducting an experiment dispelled certain hypotheses, protecting free speech in the marketplace of ideas dispelled falsehoods.[14] Justice Holmes first imported this classic interpretation of the "marketplace of ideas" into American jurisprudence in his 1919 dissent in *Abrams v. United States*.[15] Holmes stated the "best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution."[16]

Canada, on the other hand, has premised its interpretation of the breadth of free speech rights in the context of limits "necessary in a

8. U.S. CONST. amend. I.

9. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 20 (1965).

10. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

11. KROTOSZYNSKI, *supra* note 2, at 7.

12. *See id.* at 21–23.

13. Victoria Baranetsky, *The Economic-Liberty Approach of the First Amendment: A Story of* American Booksellers v. Hudnut, 47 HARV. C.R.-C.L. L. REV. 169, 175 (2012); *see also* JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 13–48 (Ronald B. McCallum ed., 1948).

14. JOHN MILTON, MILTON'S AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 65 (1873) ("Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?").

15. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

16. *Id.* at 630.

democratic society."[17] In contrast, the ascendant theory in the United States starts from a premise that free speech is an absolute right based on personal autonomy in what some have called the post-*Brandenburg* orthodoxy.[18] Under this theory, the purpose of the First Amendment was not to facilitate egalitarian self-governance, but to facilitate the liberty of rational actors in the marketplace, eventually guaranteeing much broader free speech protection.[19] Other Western countries start from a premise that free speech must give way to orderly government and therefore must not offend civility, equality, and dignity—rights that are considered the basis of a democratic society.[20] However, "[a]ll theories . . . ultimately assume either an openness or hostility toward the basic proposition that government efforts to regulate 'free speech' (however narrowly or expansively defined) are either presumptively legitimate or presumptively illegitimate."[21]

This Article will examine the consequences of free speech jurisprudence based on the American Absolutist Model and compare this model with those in Canada and Britain, which are countries that have eschewed the absolutist/individual autonomy model and based their free speech jurisprudence on democracy, civility, and individual dignity. It will also attempt to describe these differences, the theories that underpin these conflicting models, and the resultant consequences.

I. FREE SPEECH MODELS IN THE UNITED STATES

Referring to any constitutional freedom as "absolute" is implicitly expressing the corollary that there can be no exceptions.[22] One could logically conclude that when any exception to freedom of expression is permitted, free speech is no longer absolute and the only remaining question is how to find a limiting principle on this freedom that

17. KROTOSZYNSKI, *supra* note 2, at 4 (citation omitted).

18. *Id*. at 8.

19. Frederick Schauer, *First Amendment Opportunism* 3–6 (Harvard Univ., John F. Kennedy Sch. of Gov't Working Paper No. 00-011, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253832; *see also* Baranetsky, *supra* note 13, at 176.

20. KROTOSZYNSKI, *supra* note 2, at 8–9.

21. *Id*. at 13.

22. *See* Ronald Turner, *Regulating Hate Speech And the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 IND. L. REV. 257, 267 (1995).

has lost its absolutist quality.[23] By admitting an exception to the perceived absolutist meaning of the language of a rule, is the original rule superseded such that one is left with a rule having a recognized exception? Or has a completely new rule that may have proceeded from, while epiphenomenally related to the original, established a new norm? Thus, no limiting principle is needed—one merely has a new rule. This process could continue *ad infinitum*, but the question still remains—is the resultant product a rule with exceptions, or just a new rule? The American Absolutist Model is an absolute rule with exceptions.[24] This Article will demonstrate that the European Models continually create a new rule with no fixed constitutional anchoring language, thus having no effective limiting principle to act as an impediment to governmental impingement on free speech rights.

In American jurisprudence, arguments over whether to recognize exceptions to a person's right to freedom of speech are necessary only because the starting point, the language of the First Amendment, is on its face absolutist.[25] The very presence of a dispute over exceptions indicates there is a rule that at least has the appearance of being the absolute from which the exceptions derive. There is also disagreement over whether the absolute rule should be applied mechanistically, or even if an exception should be recognized at all.[26] This problem will not be solved here. However, the key to understanding this Article is to recognize that in American jurisprudence there is a debate over how to deal with and stay true to the principles underlying the absolutist language of the First Amendment. Under the European Model, as will be demonstrated below, there is no absolute touchstone from which the debate begins, thus giving an opening for repression of free speech while giving this principle lip service.

23. *See id.* ("Once the pure absolutist approach is rejected, the axiom that speech is 'free,' meaning that the speech cannot be lawfully regulated by law, is not a sufficiently accurate statement of the law. Indeed, there are many exceptions to the protection of the First Amendment.").

24. *See id.*

25. *See* MEIKLEJOHN, *supra* note 9, at 20.

26. *See* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 892–93 (1991) ("The use of an exception is a signal that the law and the society on which it presses are not in harmony. Whether this is a good or bad thing depends mostly on the particular substantive context, but it is likely that those who employ or urge what is *now* seen to be an exception are the ones who are urging change in the status quo, while those who argue against exceptions are those for whom the society's existing linguistic and conceptual structure reflects the world as they wish it to be.").

The foundation of modern American First Amendment jurisprudence is the absolutist character of its language.[27] The arguments over which exceptions to recognize merely buttress the absolutist nature of the starting point. It is in this context that the First Amendment is foundationally absolutist. Thus, as noted above, I will refer to this as the "American Absolutist Model" while at the same time recognizing that exceptions open the door for a something-less-than absolutist outcome in individual cases. Before evaluating the European Model, for contextual purposes, this Article will briefly describe the post-*Brandenburg* free-speech jurisprudence in the United States along with the exceptions recognized in its wake.

A. The Post-Brandenburg *Model*

In the United States, "liberty of speech is the normal or baseline condition of American society, and departures from that baseline by the state require strong justifications."[28] However, this was not always the absolutist interpretation; "[f]or well over 100 years after the Bill of Rights was passed, the Court had not once acted to protect First Amendment rights. In large measure, this was because the Justices did not recognize that the states were bound by the amendment until 1925."[29]

"Decisions handed down over a decade starting with the late 1930s provided the theoretical foundation for today's more fully realized First Amendment."[30] Professor Stewart Jay has elucidated this shift from a narrow, prior restraint interpretation of the free speech clause of the First Amendment to the modern, libertarian view (which I have called the American Absolutist Model).[31] For the purpose of this Article, the key point is that in the United States, "[g]overnment neutrality is the norm in regulating speech."[32] This is a unique position when compared with other countries in the Western world. According to Jay, this shift toward a more libertarian interpretation started evolving in the 1930s, and by the late 1960s the

27. *See* MEIKLEJOHN, *supra* note 9, at 20.

28. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 1017–18 (2008).

29. *Id.* at 774 (citing Gitlow v. New York, 268 U.S. 652, 666 (1925)).

30. *Id.* at 774–75.

31. *See generally* Jay, *supra* note 28 (examining the evolution of the modern interpretation of the First Amendment).

32. *Id.* at 774.

Supreme Court had "enunciated the essential principles of the modern First Amendment."[33] These principles became the foundational interpretive method in free speech cases. The absolutist nature of modern American free speech interpretive principles has naturally and suitably developed to flesh out the absolutist nature of the language of the First Amendment.

An absolutist approach is extremely important to defending individual liberty in the face of international interpretive principles that balance the needs of a democratic society with the right to free speech.[34] Do we even need to wonder which source of power will win the day—government, which controls the levers of power, or the individuals who may appeal to the inalienable right to free speech, but are in fact powerless in the face of ever-expanding governmental institutions? Therefore, if one does not start from an absolutist, written, and constitutional right to free speech, is there any reason to believe that governments will fairly balance the needs of society with the right of the individual? Faith in the ability of governmental power centers to fairly balance countervailing societal claims seems naïve at best and dishonest at worst. This Article will assume that "[p]ower corrupts and absolute power corrupts absolutely."[35] Lord Acton believed that "[g]reat men are almost always bad."[36] Even if a great man (or not-so-great politician) begins his brush with power with the best of motives, the desire to do good almost always devolves into more restrictive laws and less individual freedom.[37] The devolution does not always start with bad motives, but

> there is no point in passing a law which requires people to do something they would do anyhow; or which prevents

33. *Id.* at 775.

34. *See* KROTOSZYNSKI, *supra* note 2, at 7–10.

35. Gary Martin, *Meanings & Origins*, THE PHRASE FINDER, http://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html (last visited Jan. 21, 2014) ("'Absolute power corrupts absolutely" arose as part of a quotation by the expansively named and impressively hirsute *John Emerich Edward Dalberg Acton, first Baron Acton* (1834–1902). The historian and moralist, who was otherwise known simply as Lord Acton, expressed this opinion in a letter to Bishop Mandell Creighton in 1887: 'Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men.'"); *see also* THE FEDERALIST NO. 51, at 331 (James Madison) (Modern Library ed. 2000) ("If [all] men were angels, no government would be necessary.").

36. Martin, *supra* note 35.

37. Ben Moreell, *Power Corrupts*, RELIGION & LIBERTY (1992), *available at* http://www.acton.org/pub/religion-liberty/volume-2-number-6/power-corrupts.

> them from doing what they are not going to do anyhow. Therefore, the possessor of the political power could very well decide to leave every person free to do as he pleases so long as he does not infringe upon the same right of every other person to do as he pleases. However, that concept appears to be utterly without reason to a person who wants to exercise political power over his fellow man, for he asks himself: "How can I 'do good' for the people if I just leave them alone?" Besides, he does not want to pass into history as a "do nothing" leader who ends up as a footnote somewhere. So he begins to pass laws that will force all other persons to conform to *his* ideas of what is good for *them*.[38]

Therefore, if one accepts the premise that even good men might pass laws that are overly coercive and repressive, the only restriction on such a leader is a legal system rooted and anchored in a fundamentally absolutist law.[39] In other words, the more unrestrained power a government is given to pass laws for the good of society, the more likely that society will impinge on individual freedoms while basing these laws pretextually on the claim that they are for the societal good. This interpretation of the dangers of governmental power is vital to understanding the post-*Brandenburg* free speech jurisprudence in the United States.

Brandenburg v. Ohio articulates this modern American Absolutist Model while, at the same time, defining its limits; it presupposes that free speech is based on individual autonomy.[40] Fleshing out this principle, the Court states that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[41] Advocacy of violence is protected whereas incitement to violence is not.[42] This standard is not based on furthering collective democratic principles or protecting the dignity of individuals, but rather is based on an absolutist view of individual autonomy. The First Amendment nat-

38. *Id.*

39. *See* Turley, *supra* note 3.

40. *See generally* 395 U.S. 444 (1969) (interpreting the modern Absolutist Interpretive Model).

41. *Id.* at 447.

42. *Id.* at 447–48.

urally fits into the absolutist view, demonstrated by the fact that the Court found it "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[43] The philosophical underpinning of the First Amendment is based on "uninhibited, robust, and wide-open" freedom of speech.[44]

Essentially, this absolutist, individual autonomy, free speech viewpoint is based on individual liberty.[45] The Constitution's Free Speech Clause "suggests that its core concern is negative rather than affirmative—to restrain government from 'abridging . . . speech' rather than to protect 'rights' that require the antecedent step of identifying appropriate rights holders."[46] "In this understanding of freedom of speech, both governmental redistribution of speaking power and paternalistic protection of listeners from the force of speech are illegitimate ends that, as a categorical matter, cannot justify political speech regulation."[47] Absent governmental regulation of speech, we are left with "[t]he First Amendment axiom that we should address bad speech with better speech [which] reflects a deep normative commitment to critical inquiry and collective intellectual engagement."[48] This libertarian view of freedom of expression developed out of a political *zeitgeist* that interpreted the First Amendment not "simply [as] a technical legal rule, to be amended whenever it produce[d] inconvenient results, but rather an organizing principle of society, central to our self-understanding as a nation and foundational to a vast network of highly cherished social practices and institutions."[49] This organizing principle has resulted in "[t]he United States stand[ing] virtually alone in having no valid statutes penaliz-

43. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

44. *Id.* at 270.

45. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155 (2010).

46. *Id.* at 156; *see also* U.S. CONST. amend. I; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 349 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)) (noting that "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual'").

47. Sullivan, *supra* note 45, at 156.

48. Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 177 (2011).

49. Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2087 (1991), *quoted in* Zephyr Teachout, *The Historical Roots of* Citizens United v. FEC*: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 HARV. L. & POL'Y REV. 163, 176 (2011).

ing expression that is offensive or insulting on such grounds as race, religion, or ethnicity."[50]

There is a long line of Supreme Court cases, in effect non-exceptions to the American Absolutist Model, that protect the speech of groups judged as offensive by almost any standards. The Ku Klux Klan is protected no matter how vile the speech, speech that would probably be banned under the European Model.[51] The *Brandenburg* Court reasoned that in the absence of activity inciting or producing a violent action, the broad protections of the Constitution forbid any restraints on the freedom of speech.[52] The Court is clear that a suppression of free speech is absolutely forbidden as a policy, but does leave room for exceptions in certain situations.[53] The *Brandenburg* exception is not based on mere advocacy of violence, but on speech that contains an actual incitement to imminent lawless action.[54] The key to understanding the *Brandenburg* principle is to understand that the First Amendment protects violent speech until the speech is likely to produce imminent violence.[55] This is thoroughly consistent with the individual liberty/absolutist view of First Amendment free speech.

If there was a scenario in which a less absolutist interpretation of the First Amendment than the *Brandenburg* standard might be entertained, it would probably be the case of Nazis attempting to march, protest, parade, and disseminate hateful material in a Jewish community.[56] In *Collin v. Smith*, Skokie Village argued that display-

50. *"Hate Speech" and Freedom of Expression: A Human Rights Watch Policy Paper*, HUM. RTS. WATCH, MAR. 1992, at 1, 7, *quoted in* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 4 (1994) [hereinafter HUMAN RIGHTS WATCH].

51. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); R. v. Keegstra, [1990] S.C.R. 697 (Can.), *available at* http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/695/index.do. For more information about the Ku Klux Klan, see *About the Ku Klux Klan*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/ext_us/kkk/default.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=4&item=kkk (last visited Jan. 21, 2014) (labeling the Klan as "America's first true terrorist group"); and *Ku Klux Klan*, SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/get-informed/intelligence-files/ideology/ku-klux-klan (last visited Jan. 21, 2014) ("The Ku Klux Klan, with its long history of violence, is the most infamous – and oldest – of American hate groups.").

52. *Bradenburg*, 395 U.S. at 447.

53. *Id.* ["[C]onstitutional guarantees of free speech and free press *do not permit a State* to forbid or proscribe advocacy of the use of force or of law violation *except* where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") (emphasis added).

54. *Id.*

55. *Id.*

56. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

ing Nazi slogans promoted hatred against persons of Jewish faith or ancestry and that the Constitution does not protect speech that promotes racial or religious hatred.[57] The court, however, struck down the local Skokie ordinances that precluded the Nazis' ability to march and express their hateful opinions.[58] The court reasoned that the Nazi slogans were not obscenities, fighting words, or group libel, and were thus not encompassed by one of the few and narrow exceptions to free speech protection.[59]

Similarly, the Supreme Court upheld the right of persons to engage in unpatriotic actions even if such actions offend patriotic Americans.[60] In *Texas v. Johnson*, the Court held that the right of persons to burn an American flag during a protest rally was protected under the First Amendment.[61] In *Johnson*, protestors outside of the 1984 Republican National Convention set fire to an American flag and chanted, "America, the red, white, and blue, we spit on you."[62] Several witnesses testified that they were "seriously offended" by the flag burning.[63] The Court reasoned that protecting offensive speech is "the bedrock principle underlying the First Amendment . . . [and] that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[64]

On the other hand, Chief Justice Rehnquist was willing to uphold the prohibition on flag burning based on the special reverence in which the flag has been held throughout U.S. history.[65] He opined: "The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country."[66] In his dissent, Rehnquist departed from an absolutist view of free speech by arguing that the Court ought to deny First

57. *Id.* at 1205–06.

58. *Id.* at 1207.

59. *Id.* at 1201–03, 1204.

60. *See* United States v. Eichman, 496 U.S. 310, 311 (1990); *see also* Texas v. Johnson, 491 U.S. 397, 419–20 (1989).

61. 491 U.S. at 399.

62. *Id.*

63. *Id.*

64. *Id.* at 414.

65. *Id.* at 422 (Rehnquist, J., dissenting).

66. *Id.* at 426 (Rehnquist, J., dissenting).

Amendment protection of offensive expression targeted at the American flag.[67]

Under the Supreme Court's absolutist view of the First Amendment, even racists have protection.[68] In *R.A.V. v. City of Saint Paul*, the Court held a local ordinance aimed at quelling racism unconstitutional because it only applied to certain ideologies and subsequent expressions.[69] In that case, the City of Saint Paul enacted an ordinance that prohibited symbols on public or private property that a person "knows or has reasonable grounds to know arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[70] The Minnesota Supreme Court upheld the ordinance because the First Amendment does not protect "fighting words" on the basis that there is a "compelling government interest in protecting the community against bias-motivated threats to public safety and order."[71] That is to say, the court was tilting toward the European Model that balances free speech with human dignity, equality, and democratic government.[72]

The United States Supreme Court circumvented this analytical model and struck down the ordinance as facially invalid.[73] The Court rejected Saint Paul's argument that speech should be censored to "ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish."[74] The Court sidestepped the reasoning underlying the European Model, explaining that censorship may only be employed to the extent necessary to accomplish a valid and compelling governmental interest.[75] The Court continued:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest

67. *See id.*
68. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
69. *Id.*
70. *Id.* at 380.
71. *Id.* at 380–81.
72. *See* KROTOSZYNSKI, *supra* note 2, at 8–9.
73. *R.A.V.*, 505 U.S. at 380–81.
74. *Id.* at 395.
75. *Id.*

> distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility-but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.[76]

The Court has adopted an absolutist model; however, it has recognized some limited exceptions. The exceptions appear to be philosophically related to the European Model that balances freedom with human dignity. At the same time, the exceptions are very closely circumscribed by the Court's recognition that dangers of censorship threaten individual liberty, the very right which the American Absolutist Model of First Amendment interpretation is intended to protect.

B. A Closer Look at Exceptions to the American Absolutist Model

One of the issues to be determined in this Article is whether exceptions to the American Absolutist Model of free speech, which appear similar to the European Model, philosophically undermine the American Absolutist Model. In other words, are these exceptions to the absolutist nature of the First Amendment jurisprudence the first steps down a slippery slope that inexorably leads to the European Model?

Broadly speaking, the government must "refrain from regulating speech if the government can achieve its objectives through the use of direct regulations or taxation."[77] However, at times, the Supreme Court has departed somewhat from the strict American Absolutist Model and embraced the "assertion that freedom of speech is intertwined inextricably with the project of democratic self-government,"[78] essentially leaning toward the European Model in order to justify pragmatic exceptions. Generally,

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are 'justified without reference to the content of

76. *Id.* at 395–96 (footnote omitted).

77. KROTOSZYNSKI, *supra* note 2, at 22.

78. *Id.* at 23.

> the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'[79]

Some common exceptions are fighting words, defamatory falsehoods, and obscene and lewd speech.[80]

In *Chaplinsky v. New Hampshire*, the Court upheld a New Hampshire statute that stated, in part, "[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, . . . with intent to . . . offend or annoy him . . . ."[81] The Court begins its analysis with a hint of the European Model:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[82]

The emphasized portion, namely, that the prohibited speech is "of such slight social value . . . [that] is clearly outweighed by the social interest in order and morality,"[83] appears to be based on the European Model. But later in the opinion, the Court states that its

79. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

80. *See* DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS 85, 136, 197, 233 (2011). There may also be a National Security exception, but elucidation of it here is not necessary to make the point of this Article. *See id.* at 115.

81. 315 U.S. 568, 569, 574 (1942).

82. *Id.* at 571–72 (emphasis added) (footnote omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

83. *Id.* at 572.

decision to uphold the speech-limiting statute does not primarily rest on the social value of the speech, but on the speech's purpose as defined by New Hampshire courts, i.e., the likelihood that the prohibited speech will "cause acts of violence by the person to whom, individually, the remark is addressed."[84] Therefore, the Court has flirted with the European Model, which focuses on the social value of the speech, but ultimately based its holding on the fear that such speech would cause violence—the traditional police power public safety exception that limits actions. This upholds the American Absolutist Model while genuflecting toward the less protective social value or human dignity European Model.

Even defamation, especially when brought against a public official, is treated with great deference by the American Absolutist Model, again favoring more, rather than fewer restrictions on freedom of speech. Defamation is given greater free speech protection than one might at first assume it deserves.[85] In *New York Times v. Sullivan*, the Court constructed a high wall of "actual malice" needed to win a defamation claim against a public person, reversing a verdict by the Alabama Supreme Court that had upheld a defamation claim by a public official against his critics.[86] In doing so, the Court pointed to John Stuart Mill for support: "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[87] Note that the Court is concerned about "public debate," not an amorphous protection of human dignity or civil rights.[88] The Court here favors an absolutist view of free speech and is reluctant to allow a restriction on the speech.[89] The free marketplace of ideas in America is the basis of free speech analysis.[90] Exceptions to that model appear as reluctant intrusions necessary only in the face of actual fear

84. *Id.* at 573 (quoting State v. Chaplinsky, 18 A.2d 754, 758 (N.H. 1941), *aff'd*, 315 U.S. 568 (1942)).

85. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

86. *Id.* at 280.

87. *Id.* at 279 n.19 (quoting JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 15 (Ronald Buchanan McCallum ed., Oxford: Basil Blackwell 1947) (1859)).

88. *See id.* at 272, 279.

89. *See id.* at 291–92.

90. *See* FRALEIGH & TUMAN, *supra* note 80, at 10.

of imminent violence because more speech is better than less, and individual autonomy is better than government censorship.[91]

C. America: A Free Speech Oasis in a Sea of Censorship

Western democracies, including Canada and Britain, have signed international conventions and charters that limit expression these countries define as "hate speech."[92] This is the basis of the European Model of free speech protection and is grounded in the attractive but vague concepts of "equality, liberty and human dignity."[93] "Canada, Britain, France, Germany, the Netherlands, South Africa, Australia and India all have laws or have signed international conventions banning hate speech."[94] Further, "Israel and France forbid the sale of Nazi items like swastikas and flags" and "[i]t is a crime to deny the Holocaust in Canada, Germany and France."[95]

The United States "stands virtually alone in having no valid statutes penalizing expression that is offensive or insulting on such grounds as race, religion or ethnicity."[96] Even though the United States has passed legislation that purports to ban hate speech, this legislation only punishes the speech indirectly by requiring it to accompany a crime that would be actionable notwithstanding the concomitant abusive speech.[97] For instance, the Matthew Shepard Act specifically extends protection to victims of hate crimes based on race, color, religion, national origin, disability, or gender identity, but only if the offending individual "willfully causes bodily injury to any person or . . . attempts to cause bodily injury to any person . . . ."[98] The disfavored speech is not alone sufficient to trigger punishment; there must be an underlying act of violence toward the victim.[99]

91. *See id.* at 10–14.

92. Adam Liptak, *Hate Speech or Free Speech? What Much of West Bans Is Protected in U.S.*, N.Y. TIMES, June 11, 2008, *available at* http://www.nytimes.com/2008/06/11/world/americas/11iht-hate.4.13645369.html?pagewanted=all&_r=0.

93. *See* KROTOSZYNSKI, *supra* note 2, at 66 (quoting R. v. Zundel, [1992] 3 S.C.R. 731, 806 (Can.)).

94. Liptak, *supra* note 92.

95. *Id.*

96. HUMAN RIGHTS WATCH, *supra* note 50, at 7.

97. *See* 18 U.S.C. § 249 (2012).

98. *Id.*

99. *Id.*

The next sections of this Article will analyze the British and Canadian models of free speech jurisprudence. The issue is whether the American Absolutist Model is a better guarantor of freedom and democracy than those models that balance free speech with equality, dignity, and democracy.

II. INTERNATIONAL MODEL

First, some background detailing international conventions on free speech protections is in order because the European Model appears to have been patterned after these conventions. In the international human rights arena, freedom of expression is at least given lip service as a "cherished" right.[100] International human rights conventions have reached a universal consensus that freedom of expression should enjoy protection as an indispensable right.[101] "However, this freedom does not enjoy such a position of primacy among rights that it trumps equality rights."[102] Under virtually all international conventions and covenants, "[p]rohibiting hate speech is . . . deemed a permissible limitation on a right (freedom of expression) that no one would argue is absolute."[103] The European Convention on Human Rights of 1950 contains language that protects freedom of speech, but also limits this freedom based on the demands of a democratic society.[104] In fact, as reflected in these international

100. *See* Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 3 (1996).

101. *Id.* at n.3 ("Freedom of expression is declared a fundamental human right in all the major human rights instruments."); *see also* Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1554 (2003) ("Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II.").

102. Farrior, *supra* note 100, at 3.

103. *Id.* at 4 (parenthetical added).

104. The European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 222, *available at* http://www.hri.org/docs/ECHR50.html, states:

> 1. Everyone has the right to freedom of expression. [T]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. *The exercise of these freedoms*, since it carries with it duties and responsibilities, *may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,* in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others,

covenants, there appears to be a nearly universal acceptance of the non-absolutist nature of free speech.[105] For instance, Article 29 of the 1948 Declaration of Human Rights provides limitations on expression that are "determined by law solely for the purpose of securing due *recognition . . . for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*."[106] These concepts—public morality, public order in a democratic society, and dignity—will be a continuing theme as freedom of expression is inexorably tilted away from an absolutist model to one that is constructed to balance basic free speech rights with the needs of a democratic society.

The question each society must decide is whether to tip the scale toward the rights of individuals or the rights of the collective. Professor Farrior states: "Through a series of human rights instruments, the international community in effect has declared that there are certain *Truths*, among the most fundamental of which is the need to ensure equality and non-discrimination."[107] Note that this principle is a principle that trumps other rights, including freedom of expression, and is viewed as a near Divine Truth with a capital *T*. This principle is an implicit rejection of free speech as an absolute right that is rooted in the laws of nature. The absolute right of free speech, in this view, is replaced by a treaty-based truth that the basic rights and needs of a democratic society are the absolute bedrock of free speech jurisprudence.[108] This outlook inexorably tips the balance away from individual rights and toward the collective needs of a democratic society when there is an apparent conflict between the two values. The European Model more easily opens the door for government suppression of speech because it is based on a somewhat amorphous human dignity standard, while the American Absolutist Model implicitly impedes government intrusion on individual speech rights.

> for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

(emphasis added).

105. *See* Farrior, *supra* note 100, at 4.

106. Universal Declaration of Human Rights, G.A. Res. 217 (lll) A, art. 29, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) *quoted in* Farrior, *supra* note 100, at 12 n.57 (emphasis added).

107. Farrior, *supra* note 100, at 5 (emphasis added).

108. *See, e.g.*, *id.* at 6 n.26 ("The European Court of Human Rights has stated that one basis for the right to freedom of expression is 'the need of a democratic society to promote the individual self-fulfillment of its members.'") (citation omitted).

Interestingly, Eleanor Roosevelt, as a member of the American delegation to the U.N. Commission on Human Rights—in a debate over "whether to condemn only 'incitement to violence' against racial, national or religious minorities, or 'incitement to hatred' as well,"—recognized the inherent danger in codifying language that included a proscription on incitement to hatred as well as a proscription on incitement to violence.[109] She argued that proscriptions on words that were considered hatred alone threatened to give governments overly broad authority because "any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited."[110] Perhaps tellingly, at this convention, totalitarian regimes such as Poland, Yugoslavia, and the Soviet Union all voted in favor of a broad restriction on hate speech.[111] "[T]he Yugoslavian representative explained that although it was important to prohibit advocacy of violence, 'it was just as important to suppress manifestations of hatred which, even without leading to violence, constituted a degradation of human dignity and a violation of human rights.'"[112] During the Cold War, Yugoslavia was replete with human rights abuses notwithstanding its tacit support of freedom of expression in the debate over the language of this convention.[113] It appears that the approach of these international conventions (balancing the right of freedom of expression with the needs of a democratic society), opened a path for, or at least did nothing to impede, aggressive totalitarian governments. Although language in an international convention would be unlikely to change the nature of an aggressive, totalitarian regime, the balancing language in these covenants allowed totalitarian governments to blithely sign these conventions and then interpret basic human rights through a collective rights mentality. The language

109. *Id.* at 25, 27. For information on the U.N. Commission on Human Rights, see generally U.N. Comm'n H.R., 377th mtg., U.N. Doc. E/CN.4/SR.377 (Oct. 16, 1953) describing proposals for additional human rights protections at the Commission's May 7, 1953 meeting.

110. *Id.* at 27 (quoting U.N. Comm'n H.R., 6th Sess., 174th mtg. at 6, U.N. Doc. E/CN.4/SR.174 (May 8, 1950)).

111. *Id.* at 34 n.204.

112. *Id.* at 26 (quoting U.N. General Assembly, Third Committee, ¶ 9, U.N. Doc. A/C.3/SR.1079 (Oct. 20, 1961)).

113. *See* Univ. Neb.-Lincoln, *What Are Human Rights and Where Do They Come From?*, HUM. RTS IN THE U.S. AND THE INT'L COMMUNITY, http://www.unlhumanrights.org/01/0102/0102_01.htm (last visited Jan. 21, 2014) ("During most of the Cold War, Communist Yugoslavia under Marshal Tito was a country where most political rights were repressed . . . Tito suppressed individual rights to dissent from governmental decisions. He did not allow free and fair elections, free speech, or freedom of association.").

itself was not an obvious barrier to more and more government control. Even in non-totalitarian Western societies, the temptation for governments to control speech has been nearly irresistible.[114] Canada and Britain, both Western democratic societies with long common law traditions,[115] have adopted a European Model of free speech rights. This Article will use these countries as examples of Western countries in which the balance has tipped toward repressive government control.

III. FREE SPEECH IN CANADA

Is there free speech in Canada? One begins to wonder as word of apparent free speech repression begins to leak across the border and shock American sensibilities. In 2010, a "conservative commentator canceled her scheduled speech at the University of Ottawa after hundreds of students protested her visit and the school's provost warned her she might face criminal charges if she made racist remarks."[116] Who would subject themselves to the authority of a society which threatened criminal charges for racist remarks that had not yet been made? Satire? Unfortunately, no. What is happening in Canada?

Canada was created when the British Parliament passed the British North America Act.[117] "The doctrine of Parliamentary supremacy underlies the Act. Parliamentary supremacy asserts that a government within its jurisdiction can do anything and is not restrained by anything: Parliament is supreme."[118] In 1982, the British Parliament gave up full constitutional control of Canada when it passed the Canada Act.[119] This Act, named the Constitution of 1982, included

114. *See generally* Turley, *supra* note 3; Padraig Reidy, *Do Western Democracies Protect Free Speech?*, INDEX (Oct. 14, 2012), http://www.indexoncensorship.org/2012/10/democracy-free-speech-social-media/.

115. *Common Law and Civil Law,* CANADA IN THE MAKING, http://www.canadiana.ca/citm/specifique/lois_e.html (last visited Jan. 21, 2014) ("British Common law, also called traditional law, is law that has evolved from decisions of English courts going back to the Norman Conquest in 1066 . . . . Today Common law is applied in most countries settled or ruled by the British. In Canada, law in all the provinces except Québec is based on Common law.").

116. Jordan Michael Smith, *Canada's Clampdown on Free Speech*, BOS. GLOBE (Mar. 27, 2010), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/03/27/canadas_clampdown_on_free_speech/.

117. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

118. W.H. Jennings & Thomas Zuber, Canadian Law 10–11 (5th ed. 1991).

119. Canada Act, 1982, c. 11, § 2 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 44 (Can.).

the Canadian Charter of Rights and Freedoms.[120] Canada has included language in its Charter of Rights and Freedoms (Charter) that closely mimics the American Bill of Rights.[121] Section 2 of the Charter states:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.[122]

On its face, the Charter appears to give the same nearly absolute protections as the United States' First Amendment.[123] But the Charter dilutes these apparent absolutist freedoms in section 2 with the language of section 1, which states, "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[124] Also, section 33 of the Charter[125] "maintains the principle of [P]arliamentary supremacy . . . by authorizing legislative overrides of many Charter rights."[126] This language is reflective of the European Model because it allows for simple statutory overrides of the absolutist value of freedom of speech.

Professor Kathleen E. Mahoney writes that "genuine democracies that respect the inherent dignity of the human person, social justice, and equality accept the fundamental principle that legislative protection and government regulation are required to protect the

120. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

121. *Id.* § 2.

122. *Id.*

123. KROTOSZYNSKI, *supra* note 2, at 27–28.

124. Jennings & Zuber, *supra* note 118 (emphasis added).

125. Canadian Charter of Rights and Freedoms, *supra* note 120, § 33(1) ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.").

126. KROTOSZYNSKI, *supra* note 2, at 28.

vulnerable."[127] She acknowledges that "great care" must be used in the exercise of this regulatory power, and governments must not be seen as villains, implying that governments are trustworthy enough to use this power in such a restrained manner so as to not allow for the establishment of tyrannical regimes.[128] Mahoney understands and explains the American Absolutist Model but rejects the marketplace of ideas free speech paradigm.[129] She states:

> In this marketplace, citizens meet as equals, and no idea is suppressed. The purpose of the marketplace is to enable wise decisions to be made for the general good, based on a hearing of all viewpoints. If relevant information in the form of opinion, doubt, disbelief, or criticism is not heard, the results of the deliberations will be ill considered or unbalanced. The truth will not emerge.[130]

She further explains:

> Negative liberty, or nonintervention in the personal lives of individuals, is the cornerstone of this philosophy. While civil libertarians express concern about hate propaganda, they believe the only laws that can be justified are those prohibiting incitement to racial violence in situations of imminent peril. In other words, where there is no "clear and present danger," of violence, civil libertarians say limits on speech are not permissible. To determine "clear and present danger," they ask whether the situation at hand is analogous to falsely shouting "Fire!" in a crowded theater. If it is not, the speech limitations cannot be justified.[131]

Mahoney rejects absolute free speech rights and accepts the Canadian (European) Model on the following basis:

> [G]enuine democracies that respect . . . the fundamental principle that legislative protection and government regulation are required to protect the vulnerable. It follows that when the free speech doctrine is used by more powerful

127. Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 797 (1996).

128. *Id.*

129. *Id.* at 794–96.

130. *Id.* at 794 (interpreting Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting)).

131. *Id.* at 794–95.

> groups to seriously harm less powerful, vulnerable ones, some government action is required. Otherwise, the proper role of government and free speech is misunderstood. While great care must be taken to contain the exercise of state power, to view the government as villain for interfering is incorrect.[132]

So, rather than an absolutist model with narrow exceptions, the European Model endorsed by Mahoney allows governments to balance free speech rights with a vague concept of "inherent dignity of the human person, social justice and equality," and trusts these governments to wield this power with care.[133] However, in rejecting the American Absolutist Model, Mahoney lays a philosophical foundation for moving free speech from an individual right to a group right, with government acting as the arbiter between groups.[134] Group rights are the rights the European Model protects. Mahoney posits that the assumption that "hate speech is individualized behavior" is wrong.[135] Hate speech in this model cannot be looked at in the same way as "good" speech. She writes:

> To see hate propaganda laws as putting the government in the position of infringing individuals' rights misunderstands the purpose of hate speech. It is more accurate to analyze hate promotion as a group-based activity. Those who promote hatred, violence, or degradation of a group are aggressors in a social conflict between groups. It is a well-established principle that where groups conflict, governments must draw a line between their claims, marking where one set of claims legitimately begins and the other fades away.[136]

132. *Id.* at 797. "The Supreme Court of Canada enunciated this principle in R. v. Wholesale Travel Group, Inc., [1991] 3 S.C.R. 154. It later was applied in the hate propaganda context in R. v. Zundel, [1992] 2 S.C.R. 731. The Canadian Charter of Rights and Freedoms expressly sets out the balancing concept, as it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.* at 797 n.33 (quoting Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.)). For a discussion in the American context, see David Partlett, *From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech*, 22 VAND. J. TRANSNAT'L L. 431, 459, 468–69 (1989).

133. Mahoney, *supra* note 127, at 797.

134. *Id.*

135. *Id.*

136. *Id.*

This philosophical assumption removes a type of speech (hate speech) from the absolutist protections of the individual, and gives the Canadian government the power to define which class of speech is protected, allowing the government to enforce censorship on that speech.

In Canada, the absolutist façade of section 2 of the Canadian Charter of Rights and Freedoms is for all practical purposes checkmated by section 1,[137] which noted above, reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[138] This conflict between sections 1 and 2 of the Charter essentially creates a constitutional structure for balancing the absolute free speech rights of individuals with the demands of equality and dignity of groups that this political philosophy posits are the *sine qua non* of a democratic society.

This is entirely different from the American Absolutist Model in which the First Amendment contains no apparent room for exceptions. The language of the First Amendment is absolutist,[139] and in instances in which free speech interests are balanced against other social interests, the exceptions are made entirely by the U.S. Supreme Court,[140] and not imbued with the permanency and legitimacy inherent in the language of a constitution. In Canada, the absolutist language in section 2 is almost always swept away by the Supreme Court of Canada's interpretation of section 1 if there is "a plausible reason for regulating speech activity and [if] the regulation enacted bears a rational relationship to the objective,"[141]—a very low bar indeed.

A. Canada's Human Rights Act (CHRA) and Its Impact on Free Speech

The threat to free speech in Canada and the lack of protection afforded by section 2 of the Charter of Rights and Freedoms became

137. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

138. *Id.* § 1 (emphasis added).

139. U.S. CONST. amend. I.

140. KROTOSZYNSKI, *supra* note 2, at 41.

141. *Id.* at 43.

blatantly apparent after Parliament passed the Canadian Human Rights Act.[142] The Act's self-described purpose reads as follows:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.[143]

So far so good. But sections 12 and 13 of the Act extend its prohibitions to include not only alleged hateful actions, but also expressions of the alleged hate.[144] The problematic language in section 12 is the use of "publish" and "display," and in section 13 it is the use of "cause to be so communicated" and "likely to expose a person or

142. Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 2.

143. *Id.*

144. In relevant part, sections 12 and 13 of the Canadian Human Rights Act state:

> 12. It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that
>
> (a) expresses or implies discrimination or an intention to discriminate, or
>
> (b) incites or is calculated to incite others to discriminate if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.
>
> 13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Canadian Human Rights Act, R.S.C. 1985, c. H-6, §§ 12–13.

persons to hatred or contempt."[145] This language converts a civil rights action to a free speech/censorship action.

Section 13 of the Act was first challenged in the Canadian Human Rights Tribunal as a violation of section 2 of the Charter of Human rights in a 1979 case, *Smith & Lodge v. Western Guard Party*.[146] That court immediately recognized the apparent conflict between the Charter and the Act. The court writes: "At first glance, it would seem anomalous that the Canadian Human Rights Commission, which by its name would appear to be in favour of fundamental freedoms, is one of the Complainants arguing for the restriction of the Respondents' general freedom of speech."[147] The Commission however, deserts the section 2 speech protections as it takes on the task of bringing harmony to the conflict: "Nevertheless, Parliament has obviously ordained that *certain kinds of speech have to be curtailed in the public good* because the *potential for harm outweighs the value to society* in the guarantee of unrestricted freedom of speech."[148] This is the European Model.

Similarly, the Canadian Supreme Court in *R. v. Keegstra*,[149] wrestling with a criminal statute that proscribed speech, recognized that the statute conflicted with the speech protections of section 2(b) of the *Charter*. In that case, "an Alberta high school teacher was charged under S. 319(2) of the *Criminal Code* with willfully promoting hatred . . . by communicating anti-semitic statements."[150] The Supreme Court upheld the teacher's conviction, accepting reasonable restrictions on hate speech even though that speech was not likely to lead to violence.[151] The court reasoned:

> Section 319(2) of the *Code* constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the

145. *Id.*

146. 1979 CHRT 1 (Can.).

147. *Id.* at 2.

148. *Id.* (emphasis added); *see infra* note 162 for a description of the purpose of the Canadian Human Rights Commission.

149. [1990] 3 S.C.R. 697 (Can.), *available at* http://scc.lexum.org/en/1990/1990scr3-697/1990scr3-697.html.

150. *Id.* at 698.

151. *Id.*

> pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the willful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the *Charter* strongly buttress the importance of this objective.[152]

This indicates that speech protected by section 2 of the Charter can be overridden based on "the work of numerous study groups." But the real culprit in allowing this kind of censorship is section 1 of the Charter.[153] In Canada, free speech is not assured, but hangs tenuously on the fraying string of the outcome of the next study group that tips the balance from the free speech absolute protections of section 2 to the European Model "free and democratic society" language of section 1.[154]

B. How the Canadian Human Rights Act Was Abused to Violate Freedom of Speech

Once the Supreme Court of Canada accepted the proposition that an act of Parliament can limit free speech based on "reasonable restrictions" on hate speech, the way was opened to use section 13 of the Human Rights Act to judicially oppress Canadians based on the content of their speech.[155] Section 13 of the Act is the dagger pointed at the heart of free speech in Canada. The Canadian Human Rights Commission (CHRC) is the hand that wields the dagger.[156] The

152. *Id.* at 699 (emphasis added).

153. "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

154. *Id.*

155. Canadian Human Rights Act, R.S.C. 1985, c. H-6, §§ 12, 13, *available at* http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html.

156. The Canadian Human Rights Commission is an independent body established by Parliament in 1977 to administer the Canadian Human Rights Act. *About Us*, CANADIAN HUMAN RIGHTS COMMISSION, http://www.chrc-ccdp.gc.ca/eng/content/about-us (last visited Jan. 21, 2014).

Canadian Human Rights Tribunal (Tribunal) is the entry point of the dagger that penetrates to the heart of freedom of expression. The Tribunal's self-described mission is as follows:

> The Canadian Human Rights Tribunal has a statutory mandate to apply the *Canadian Human Rights Act* based on the evidence presented and on the case law. Created by Parliament in 1977, the Tribunal is the only entity that may legally decide whether a person or organization has engaged in a discriminatory practice under the Act. If one of the parties involved does not agree with the Tribunal's decision, an appeal may be filed at the Federal Court of Canada.
>
> The Canadian Human Rights Commission is the first point of contact for *registering a formal complaint under the Canadian Human Rights Act*. *The Tribunal can only deal with cases which have been referred to it by the Commission.* Since the CHRT functions like a court it must remain impartial. It cannot take sides in discrimination cases or make any decision without a formal investigation and referral by the CHRC.
>
> The Tribunal's jurisdiction covers matters that come within the legislative authority of the Parliament of Canada, including federal government departments and agencies and Crown corporations, as well as banks, airlines and other federally regulated employers and providers of goods, services, facilities and accommodation.[157]

In summary, section 1 of the Canadian Charter of Rights and Freedoms undermines the absolute right of free speech guaranteed by section 2 of the same Charter. Then section 13 of the Canadian Human Rights Act made it discriminatory to engage in speech that is merely "likely" to expose a person to contempt or hatred,[158] and then the Canadian Human Rights Commission was set up to administer the Act and to set the Tribunals to enforce the Act; all these

157. *Jurisdiction–Canadian Human Rights Act*, CANADIAN HUMAN RIGHTS TRIBUNAL, http://chrt-tcdp.gc.ca/NS/about-apropos/jurisdiction-competence-eng.asp (last visited Jan. 21, 2014) (emphasis added).

158. It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination. *See* Canadian Human Rights Act § 13(1).

administrative enforcement mechanisms provide no clear standard that demands that the complainant actually show harm. The Canadian Human Rights Tribunal is, in effect, a Star Chamber[159] that polices speech of individual Canadians. To be clear, it is section 13 of the Canadian Human Rights Act that finished gutting the absolutist definition of free speech by allowing censorship of mere communication that was "likely to expose" another person to contempt.[160] This then allowed the Tribunals to censor and persecute individuals based on the content of their speech.[161] To make matters worse, individual Canadian provinces have since instituted their own Human Rights Tribunals.[162] To be fair, the Human Rights Tribunals were originally established in the 1970s to remedy discrimination in housing and employment.[163] However, "the Law of Unintended Consequences kicked in, and the Commissions began silencing citizens who declined to embrace the new vision of Canada being foisted upon them by then-prime minister Pierre Trudeau: multicultural and pacifist; blindly tolerant; anti-tradition, anti-family and anti-life."[164]

The horror stories of persecution and abuse based on the actions of these Tribunals finally entered the collective Canadian consciousness when the Alberta Human Rights tribunals brought a complaint against a well-known Canadian journalist, Ezra Levant, and the Canadian Human Rights Tribunal brought a complaint against *Maclean's Magazine* based on an article written by author Mark Steyn,[165]

Till that point in time, it was casually assumed that anyone

159. 9 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 307 (Shirelle Phelps & Jeffrey Lehman eds., 2d ed. 2005) (defining "Star Chamber" as "an ancient high court of England, controlled by the monarch, which was abolished in 1641 by Parliament for abuses of power") (emphasis omitted).

160. *See* Canadian Human Rights Act § 13(1).

161. *See* Jonathan Kay, *Jonathan Kay: Good Riddance to Section 13 of the Canadian Human Rights Act*, NAT'L POST (June 7, 2012, 1:03 PM), http://fullcomment.nationalpost.com/2012/06/07/jonathan-kay-good-riddance-to-section-13-of-the-canadian-human-rights-act/.

162. *See e.g.*, INFACT CANADA, http://www.infactcanada.ca/bf_commissions.htm (last visited Jan. 21, 2014). *See also HR Policies & Employment Legislation*, HRCOUNCIL.CA, http://www.hrcouncil.ca/hr-toolkit/policies-human-rights.cfm (last visited Jan. 21, 2014) (listing Provincial Human Rights Commissions of Canada and their websites).

163. KATHY SHAIDLE & PETE VERE, THE TYRANNY OF NICE: HOW CANADA CRUSHES FREEDOM IN THE NAME OF HUMAN RIGHTS (AND WHY IT MATTERS TO AMERICANS) 4 (2008).

164. *Id.*

165. Mark Steyn, *Introduction* to KATHY SHAIDLE & PETE VERE, THE TYRANNY OF NICE: HOW CANADA CRUSHES FREEDOM IN THE NAME OF HUMAN RIGHTS (AND WHY IT MATTERS TO AMERICANS), at x, xi (2008).

> caught up in human-rights quasi-litigation was a fringe commentator scribbling out unfashionable, retrograde views on race-mixing, or the Jewish "bacillus," or some such. But Mr. Steyn was an internationally acclaimed commentator writing on a real, modern threat that, in its most virulent form, had destroyed a large chunk of Manhattan, and which our troops were fighting against in Afghanistan.[166]

But, before these more high-profile complaints surfaced, the tribunals were intent on censoring the "little guy" who did not have the resources to defend a prolonged suit.[167]

> In 2002 the Saskatchewan Tribunal ordered Saskatoon Star Phoenix and [a citizen,] Hugh Owens to each pay $1,500 to three complainants because of the publication of an advertisement that quoted Bible verses on homosexuality . . . . And [i]n 2006, the Saskatchewan Human Rights Commission (SHRC) ordered Catholic activist Bill Whatcott to pay $17,500 to four complainants who complained that their "feelings" and "self-respect" were "injured" by Whatcott's pamphlets denouncing the "gay lifestyle" as immoral and dangerous. [Both] decision[s] [were] later overturned in the regular court system.[168]

166. Kay, *supra* note 161.

167. *See, e.g.*, EZRA LEVANT, SHAKEDOWN: HOW OUR GOVERNMENT IS UNDERMINING DEMOCRACY IN THE NAME OF HUMAN RIGHTS 19 (2009).

> The main reason that today's human rights commissions feel so un-Canadian is that their operations violate the most basic principles of natural justice. As soon as a human rights complaint is filed, the deck is stacked against the accused. For most of Canada's HRCs, taxpayers foot the bill so that government-paid bureaucrats can investigate complaints and government-paid lawyers can prosecute them. The targets of those complaints, on the other hand, don't get any government help. Many are too poor to hire lawyers and private investigators, so they must fend for themselves against an army of public paper-pushers. (A study of the cases in which the Canadian Human Rights Commission investigated allegations of hate speech, for example, found that 91 per cent of the government's targets were too poor to afford lawyers and appeared either on their own or with representation by a non-lawyer volunteer.) In other words, it's a turkey shoot for the government, with poor, intimidated targets fighting against the unlimited resources of the state.

Id.

168. Thaddeus M. Baklinski & John Jalsevac, *Canadian Province May Scrap Controversial Human Rights Tribunal*, LIFESITENEWS.COM (Apr. 21, 2010), http://www.lifesitenews.com/news/archive//ldn/2010/apr/10042112.

British Columbia also has had its share of outrageous tribunal outcomes. The British Columbia Human Rights Tribunal "awarded a former McDonald's employee about $50,000 after the restaurant dismissed her for failing to abide by its common sense hand-washing policy."[169] The Tribunal's reasoning was absurd, as they declared that "[t]here was no evidence of the relationship between food contamination and hand-washing . . . [i]n essence, the [tribunal] had just declared those ubiquitous 'Employees Must Wash Hands' signs to be the moral equivalent of older, truly hateful ones like 'No Irish Need Apply' or 'Whites Only.'"[170]

There is no need to continue describing the litany of abuses by these tribunals. The tribunals appear to have reached the apex of their power with the attack on *Maclean's Magazine* and Mark Steyn.[171] *Maclean's* had published an excerpt from Steyn's book, *America Alone: The End of the World as We Know It*.[172] Steyn's satirical and rather unextraordinary commentary on contemporary Islam resulted in the Canadian Islamic Congress filing three Human Rights Commission complaints against Steyn and *Maclean's*.[173] The Islamic Congress charged Steyn and *Maclean's* with "'exposing Muslims to hatred and contempt' for, among other things, accurately quoting a Norwegian imam who boasted that Muslims were breeding 'like mosquitoes,' and running Steyn's negative review of the CBC sitcom *Little Mosque on the Prairie*."[174]

The Tribunal's proceeding against both Steyn and *Maclean's* ended with a whimper. The Ontario Human Rights Commission issued a statement announcing that the tribunal would not hear the complaint.[175] The Canadian Human Rights Commission similarly dismissed the complaint without a hearing.[176] The British Columbia Human Rights Tribunal, after a five day hearing, ultimately dismissed the complaint "because the complainants have not shown that [the Steyn article] rises to the level of hatred and contempt, as

169. *See* SHAIDLE & VERE, *supra* note 163, at 3.

170. *Id.*

171. *See* Steyn, supra note 165, at xi.

172. MARK STEYN, AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT (2008), *reprinted in* Mark Steyn, *The Future Belongs to Islam*, MACLEAN'S (Oct. 20, 2006), http://www.macleans.ca/culture/books/article.jsp?content=20061023_134898_134898.

173. Steyn, *supra* note 165, at vii.

174. *See* SHAIDLE & VERE, *supra* note 163, at 31.

175. *Id.* at 36.

176. *Id.* at 43.

those terms have been defined by the Supreme Court of Canada, to breach [section] 7(1)(b) of the [*Human Rights*] *Code*."[177] Until this decision, the commissions had "boast[ed] a Stalinist 100 percent conviction rate on 'hate crime' cases," and "[t]he majority of the most controversial cases [had] been prosecuted under section 13.1 of Canada's Human Rights Act."[178] Can there be any doubt that the high profile of *Maclean's* and Steyn exposed the egregiousness of the tribunals?

In fact, on June 6, 2012, after a long battle, the Conservatives in Parliament, on nearly a party-line vote, repealed section 13 of the Canadian Human Rights Act, thus ending the authority for these faux courts.[179] However, free speech in Canada is still not assured. Prime Minister Harper, before the repeal of section 13, had stated that "everyone has some concerns" about hate speech and reaffirmed the European Model and its balance between the protection of free speech and the incitement of hatred.[180] A system that protects speech as the highest principle of freedom does not balance this freedom against the fear of inciting hatred; it allows a near absolute freedom of expression and only limits that freedom when there is a compelling reason to do so, such as the clear and present danger that it will incite violence.

Although repeal of section 13 of the Canadian Human Rights Act may appear to be a victory for free speech in Canada, this repeal has merely removed the federal kangaroo courts/tribunals permitted by section 13. Hate speech tribunals still exist on the provincial level, and on the federal level, "hate speech remains a criminal offence in Canada" under section 319(2) of the Criminal Code.[181] Canada is

177. Elmasry v. Roger's Publ'g, 2008 BCHRT 378, para. 6 (Can.).

178. *See* SHAIDLE & VERE, *supra* note 163, at 5.

179. Jason Fekete, *Tories Repeal Sections of Human Rights Act Banning Hate Speech over Telephone or Internet,* NAT'L POST (June 7, 2012), http://news.nationalpost.com/2012/06/07/tories-repeal-sections-of-human-rights-act-banning-hate-speech-over-telephone-or-internet/.

180. *Id.*

181. Alan Shanoff, Opinion, *Changes to Human Rights Act Will Have Little Impact on Free Speech*, THESUDBURYSTAR.COM (July 12, 2013), http://www.thesudburystar.com/2013/07/12/shanoff-changes-to-human-rights-act-will-have-little-impact-on-free-speech.

> [H]ate speech remains a criminal offence in Canada. Section 319 (2) of the Criminal Code sets forth the offence of communicating statements, other than in private conversation, that wilfully promotes hatred against any segment of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. The offence of wilfully promoting hatred is backed up by the potential for imprisonment of up to two years.

Id.

essentially still left with the conflict between sections 1 and 2 of the Canadian Charter of Rights and Freedoms—with section 2 setting out the absolutist framework and section 1 providing the context in which all the other sections are to be interpreted, i.e., the European Model, which subjugates freedoms "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[182] The inherent conflict between these two sections almost begs for governmental abuse of power such that section 1 is read as more important than the absolutist protections of section 2.

IV. THE BRITISH MODEL OF FREE SPEECH RIGHTS

A. Tradition of British Free Speech Protections

Starting with the common law tradition is especially important in Britain, as no specific document exists that one can point to as the British constitution.[183] "All of Great Britain's hate speech regulations are premised upon the common law offense of seditious libel."[184] This offense punishes the publication or articulation of words that promote feelings of hostility or ill will, words that promote, or intend to promote, hostility or ill will against the Crown or any of its subjects.[185] However, seditious libel prosecutions were rarely successful because "under the common law, the defendant was only guilty if his or her speech led to a direct incitement to violence or public disorder."[186] Common law speech prosecution changed when section 5 of the Public Order Act of 1936 weakened the necessity of "direct incitement to violence" by allowing prosecution based on "mere intent to provoke violence."[187] This weakening of free speech rights can be done merely by an act of Parliament.[188] There is no

182. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

183. *See* Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 332 (2002).

184. Nathan Courtney, Note, *British and United States Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT'L L. 727, 729 (1993).

185. *See id.* (citing ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 345 (1972)).

186. *Id.* at 730.

187. *Id.* at 730–31. *See* Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6 § 5 (Eng.).

188. Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition,"* 39 TEX. TECH L. REV. 261, 271 (2007).

written constitution in Britain to appeal to for protection of individual speech rights.[189]

If one accepts that a written document is necessary for a state to have a constitution, Britain then does not have a constitution in the same sense as does the United States.[190] Professor Vick summarizes the foundations of the British system:

> [T]here are no constitutional rules that are differentiated from other areas of law, there are no laws that cannot be changed or abandoned by a simple majority vote in Parliament, and there is no single, identifiable document that is widely accepted as a systematic statement of the basic tenets of British constitutional law.[191]

This amorphous constitutional tradition works in Britain and has produced political stability because "[u]nlike most countries with written constitutions, such as the United States, in the United Kingdom there has been no dramatic break with previous constitutional arrangements that has required a restatement of constitutional principles since, at the latest, the beginning of the eighteenth century."[192] Each act of Parliament, in effect, becomes an amendment to the nonstatic British constitution, but an amendment that is generally rooted in long-standing political traditions.[193] And "[t]he most important common law source of constitutional principles is judicial precedent."[194] Because of its unwritten nature, the British constitution is "less stable but more adaptable" than the U.S. Constitution.[195] However, "if an act of Parliament is ambiguous, the British courts are free to interpret the act consistently with the European Convention on Human Rights and Fundamental Freedoms (ECHR)."[196] But absent this appeal to the European Court of Human Rights in Strasbourg based on the ECHR, the absence of a written constitution "circumscribes the British judiciary's ability to vindicate speech interests."[197]

189. *See* Vick, *supra* note 183, at 340.

190. *Id.* at 332.

191. *Id.*

192. *Id.* at 333.

193. Jacob, *supra* note 188, at 271.

194. Vick, *supra* note 183, at 338.

195. *Id.* at 339.

196. Ronald J. Krotoszynski, Jr., Brand & Rust v. Sullivan*: Free Speech and the Limits of a Written Constitution*, 22 FLA. ST. U. L. REV. 1, 9 (1994). See *supra* note 104 for text of Article 10.

197. Krotoszynski, *supra* note 196, at 8.

Free speech per se seemed to be getting some protection when Britain enacted the Human Rights Act in 1998.[198] Before this Act was passed, there was no distinct code—or Bill of Rights—which comprehensively enumerated civil liberty rights.[199] "The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."[200] Is this adequate to protect British citizens from government overreach?

B. Effect of the British Human Rights Act

Prior to passage of this Act, even though Britain was a signatory, the ECHR had very little effect on British law, including protections on free speech rights, because parliamentary sovereignty prevented an international treaty from altering British Law even though it had been signed by the executive.[201] However, under the Human Rights Act, enacted legislation "must be 'read and given effect in a way which is compatible with the Convention rights' to the extent that 'it is possible to do so.'"[202] Also, British courts "are required to interpret legislation so as to give effect to Convention rights unless the terms of an act of Parliament are 'so clearly incompatible with the Convention that it is impossible to do so.'"[203] In spite of this seeming deference to the Human Rights Act, the rights that appear to be enshrined in it are still subordinate to the sovereignty of Parliament.[204]

The British judicial system, specifically the Supreme Court, has analyzed free speech cases using language similar to that of the U.S. Supreme Court.[205] However, "English courts do not possess a direct textual command to consider free speech claims."[206] For instance, in *Regina v. Secretary of State for Home Department, Ex parte Brind*, a case decided by a panel of the House of Lords acting as the Supreme Court, the court "appeared to import a 'compelling state interest' test into a routine review of an administrative regulation," without

198. Human Rights Act, 1998, c. 42 (U.K.).
199. Vick, *supra* note 183, at 340.
200. *Id.* (quoting Liversidge v. Anderson [1942] A.C. 206 (H.L. 261.)).
201. *See* Vick, *supra* note 183, at 344.
202. *Id.* at 355.
203. *Id.*
204. *Id.* at 363.
205. Krotoszynski, *supra* note 196, at 15.
206. *Id.* at 7.

any textual foundation to which to point, "all in the name of protecting the 'fundamental right' of free speech."[207]

However, despite articulating a test that identifies speech as a fundamental right, without a written British constitutional protection of free speech, these rights discussed in *Brind* do not offer the same level of protection as does the First Amendment of the U.S. Constitution. "The absence of a written constitution containing a guarantee of free speech no doubt is in part responsible for the English judiciary's failure to vindicate free speech and free press claims routinely."[208] Given the tradition of parliamentary supremacy, British courts do not possess the authority to overturn a properly promulgated act of Parliament.[209] British courts have limited leeway when evaluating an act of Parliament to declare language in the bill ambiguous and to then interpret the act based on the relevant language in the European Convention on Human Rights.[210] This is a very narrow window in which to vindicate free speech rights. It is even narrower when one considers that the European Convention itself has limiting language based on the needs of a democratic society.[211]

The British Human Rights Act contains provisions on free expression that are similar to the balancing language in most international conventions. On the one hand, the Act contains absolutist language,[212] and on the other hand it contains language limiting the rights within the Act.[213] Compare this with the absolutist language of the First Amendment to the U.S. Constitution—there is no limiting language in America's controlling document.[214]

The alleged free speech protections of the British Human Rights Act have had no apparent effect on some troubling language in the

207. *Id.* at 4 (citing 1 A.C. 696 (H.L.) 748–49, 750, 763 (appeal taken from C.A.)).

208. *Id.* at 7.

209. *Id.* at 8.

210. *Id.* at 9.

211. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

212. Human Rights Act, 1998, c. 42, § 1(3), sch. 1 (U.K.) (adopting the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10(1), 213 U.N.T.S. 222) ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.").

213. *Id.* (adopting the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10(1), 213 U.N.T.S. 222).

214. U.S. CONST. amend I.

Public Order Act of 1986.[215] Under sections 4A and 5 of the Public Order Act, a person may be arrested for insulting language if the person is found to have merely intended to cause harassment, alarm, or distress.[216] Insulting words under the Public Order Act are

215. Public Order Act, 1986, c. 64 §§ 4A-5 (Eng.).

216. Section 4A: Intentional harassment, alarm or distress.

(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he–

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

(3) It is a defence for the accused to prove–

(a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(b) that his conduct was reasonable.

(4) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

Section 5: Harassment, alarm or distress

(1) A person is guilty of an offence if he–

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove–

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable.

(4) A constable may arrest a person without warrant if–

(a) he engages in offensive conduct which [a] constable warns him to stop,

enough to permit the police to arrest, incarcerate or fine an alleged offender. This is possible in spite of the protections of the Human Rights Act because the absolutist language of Article 10(1) are undercut by the language of 10(2): "[t]he exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society."[217]

The language of Article 10(2) is an open door for the mere speech "insulting or abusive language" arrests based on section 5 of the Public Order Act of 1986, and thus is a de facto invitation for the authorities to squelch freedom of speech. One would expect a parade of free speech violations under section 5 of the Public Order Act because police officers have the authority to arrest based on the officer's subjective definition of insulting or abusive language. Section 5 does not disappoint: "Section 5 was used to issue a court summons to a 16-year-old protester for peacefully holding a placard that read: 'Scientology is not a religion it is a dangerous cult.' An allegation that the sign was 'abusive or insulting' was referred to the Crown Prosecution Service."[218] Based on section 5, an individual was arrested

> for what was described as a 'daft little growl' and a 'woof' aimed at two Labrador dogs. Although the dog owner did not want a prosecution, [the man] was detained for five hours and prosecuted. He was convicted and fined. On appeal Newcastle Crown Court quashed his conviction. The case cost the taxpayer £8,000.[219]

Members of a Lesbian, Gay, Bisexual and Transgender (LGBT) group, Outrage!, were "arrested and charged under Section 5 for shouting slogans and displaying placards that condemned the

> and
>
> (b) he engages in further offensive conduct immediately or shortly after the warning.
>
> (5) In subsection (4) "offensive conduct" means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the further conduct need not be of the same nature.
>
> (6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Id. at §§ 4A, 5.

217. Human Rights Act, 1998, c. 42, § 1(3), sch. 1 (U.K.).

218. *Victims of Section 5*, REFORM SECTION 5, http://reformsection5.org.uk/#?sl=3 (last visited Jan. 22, 2014).

219. *Id.*

persecution of LGBT people by Islamic governments."[220] The protesters were campaigning against a rally led by the fundamentalist Muslim group, Hizb ut-Tahrir, which called for the killing of gay people, apostates, Jews, and unchaste women.[221] The police considered the placards insulting and likely to cause distress.[222]

The police arrested an Oxford student, under section 5, for saying to a police officer: "Excuse me, do you realise your horse is gay?"[223] A Thames Valley Police spokesman said: "he made homophobic comments that were deemed offensive to people passing by."[224] In another example, "Christian hoteliers Ben and Sharon Vogelenzang were charged with breaching section 5 for engaging in a conversation with a Muslim guest about Mohammed and Islamic dress for women. After lengthy questioning by police they were charged and later tried at Liverpool magistrates' court."[225] Section 5 was again utilized when police threatened to arrest and seize property from animal rights protesters showing their objection to seal culling by displaying toy seals with red food coloring on them. The police informed the protesters that the toys were deemed distressing by two members of the public, and ordered them to "move on."[226]

Some of these complaints were subsequently heard in court and were dismissed, but not all. For instance,

> [a]n elderly street preacher was convicted under section 5 for displaying a sign which said homosexual conduct was immoral. Some passers by became angry and tried to remove the sign, others threw water and dirt at Mr. Hammond. When police were called, they arrested Mr. Hammond. He was prosecuted, convicted, and fined £300 plus £395 court costs. The High Court later upheld the conviction saying magistrates were entitled to find the sign "insulting" to homosexuals. No one in the crowd was charged.[227]

Atheists must also beware what they say. An atheist pensioner who placed a small sign in the window of his home saying "religions are

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

fairy stories for adults" was told by police he could be arrested under section 5 if he refused to remove the poster. John Richards, from Lincolnshire, emailed police asking what would occur if he posted the A4 sign. Lincolnshire Police replied "[i]f a complaint is made then it can lead to you being arrested and dealt with for the offence of section 5 public order causing alarm and distress."[228] There have been thousands of such prosecutions in recent years in the U.K. based on section 5, so much so that some in the British media fear that freedom of expression in the United Kingdom is threatened.[229] The government has recently announced that the word "insulting" has been removed from section 5 by the House of Lords.[230] The House of Commons has decided to let that bill stand, it appears reluctantly, not by passing a similar bill in its chamber, but by announcing, "[I]n the Commons second reading debate the Home Secretary said that whilst the Government support the retention of section 5 as currently worded, it is 'not minded' to challenge the amendment in the light of assurances from the Director of Public Prosecutions."[231] While eliminating "insulting" from section 5, "abusive" and "threatening" language remains as an offence. "Abusive" in some dictionaries is a synonym for insulting.[232] Whether section 5 does or does not keep "insulting" in its text, the point of this Article is that the people of Britain are subject to government sanction based on mere use of language alone, not violence or threats of violence.[233]

Section 5 of the Public Order Act of 1986 is not the only statute that U.K. police have used to suppress speech. More than 1,286 people were convicted in 2011 for mere expression in electronic media

228. *Id.*

229. Alex Newman, *In U.K., Freedom of Speech and Press Hang in the Balance*, NEW AM. (Dec. 26, 2012, 1:12 PM), http://www.thenewamerican.com/world-news/europe/item/14029-in-uk-freedom-of-speech-and-press-hang-in-the-balance.

230. Pat Strickland & Diana Douse, *"Insulting Words or Behavior": Section 5 of the Public Order Act,* 1986, 15 Jan. 2013, H.C., *available at* http://www.parliament.uk/briefing-papers/SN05760.

231. *Id.*

232. AUDIOENGLISH.ORG, http://www.audioenglish.org/dictionary/insult.htm (last visited Jan. 22, 2014).

233. "Whether behaviour can be properly categorised as disorderly is a question of fact. Disorderly behaviour does not require any element of violence, actual or threatened . . . ." Public Order Offences Incorporating the Charging Standard, CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/p_to_r/public_order_offences (last visited Jan. 22, 2014).

like Twitter and Facebook.[234] Section 127 of the Public Communications Act[235] makes it a criminal act to use electronic communication for "grossly offensive speech,"[236] or for the purpose of causing "annoyance, inconvenience or needless anxiety to another."[237] For example, a U.K. man was jailed under the "grossly offensive" language of section 127 when he posted admittedly tasteless comments regarding a five-year-old kidnap victim.[238] Also under this section,

> Paul Chambers, 28, of Northern Ireland, [was found] guilty of unlawfully sending a message that was also deemed "grossly offensive" or "of an indecent, obscene or menacing character," in 2010, after he tweeted that he would "[blow] the airport sky high!" after his flight was cancelled following poor weather at Robin Hood Airport, U.K."[239]

One might argue that this misguided Facebook post could be construed as a terrorist threat, but note that Mr. Chambers was not charged as a terrorist, but was instead charged under the Public Communications Act.[240]

234. Newman, *supra* note 229.

235. Public Communications Act, 2003, c. 21, § 127 (U.K.).

> (1) A person is guilty of an offence if he–
>
> (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be so sent.
>
> (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he–
>
> (a) sends by means of a public electronic communications network, a message that he knows to be false,
>
> (b) causes such a message to be sent; or
>
> (c) persistently makes use of a public electronic communications network.
>
> (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

Id.

236. *Id.* § 127(1)(a).

237. *Id.* § 127(2).

238. Zack Whittaker, *U.K. Man Jailed over Facebook Status Raises Questions over Free Speech*, CBS NEWS (Oct. 19, 2012, 4:26 PM), http://www.cbsnews.com/8301-205_162-57536372/u.k-man-jailed-over-facebook-status-raises-questions-over-free-speech/.

239. *Id.* On a second appeal to the U.K. high court in London, the conviction was ultimately quashed. *Id.*

240. *Id.*

There are many more examples of prosecutions in 2011 under section 127 of the Public Communications Act.[241] These Acts allow criminal prosecution for mere insulting or offensive language. [242] However, the larger point must not be missed that "U.K. residents are limited in what they can and cannot say under the resolve that it may simply offend wider society."[243] Unless Parliament scrubs all language from all legislation in Britain in which vague terms have been used to define speech violations, U.K. residents have no protection based on a foundational, permanent, and fixed constitution.

Can unfettered governments be trusted to use their authority in a restrained manner such that basic free speech rights are protected? The editors of the *Daily Telegraph* in Britain wrote: "Perhaps the most depressing thing about this saga has been the way in which the state automatically reached for a sledgehammer when faced with a nut."[244] Isn't that the fear—government over-reach? As this Article has discussed, "power corrupts and absolute power corrupts absolutely."[245]

CONCLUSION

This Article began with the assertion that the "death throes of free speech" have already begun in Europe.[246] This has been demonstrated by examining International Conventions,[247] the precarious position of free speech jurisprudence in Canada, and Britain's tenuous free speech protections.[248] Prior to looking at the European Model, for comparison, this Article provided a brief overview of the more

241. *See id.*

242. The House of Lords voted in December 2012 to repeal the "insulting" language provision of Section 5 of the Public Order Act of 1986. Angela Lu, *U.K. to Ease Free Speech Restrictions*, WORLD (Dec. 18, 2012, 9:30 AM), http://www.worldmag.com/2012/12/uk_to_ease_free_speech_restrictions. Geoffrey Dear, the House of Lords member who drafted the amendment stated that "[i]ncreasingly the police and other law-enforcement agencies are misinterpreting the legislation to such an extent that it is impinging on the right to free speech." *Id.* In order for this language to be deleted from Section 5, the House of Commons must also repeal the language. *Id.*

243. Whittaker, *supra* note 238.

244. Lu, *supra* note 242 ("The government . . . used the insult law to arrest several street preachers who said homosexual behavior was morally wrong. In one case, police arrested Dale Mcalpine in 2010 after he told a gay police officer that homosexuality was a sin.").

245. Martin, *supra* note 35.

246. Sabaditsch-Wolff, *supra* note 1.

247. *See supra* Part II.

248. *See supra* Part IV.

absolutist free speech model in the United States.[249] At its core, the American approach to free speech protection is, while not completely diametrically opposed to the European Model, foundationally very different and much more protective of liberty.[250]

The American Absolutist Model uses incitement of violence as its limiting principle on censoring speech.[251] This is a very narrow band of unprotected speech, especially when compared to the "insulting words" or "contempt[uous]" language standards in Britain and Canada.[252] The American Absolutist Model is the result of a robust American tradition anchored in a clear, unambiguous statement of the desirability of limiting governmental power.[253] It is not a serendipitous accident. Foundationally, the Constitution and the Bill of Rights spring from a tradition that recognizes all men are not angels, and governments tend to accumulate power at the expense of the governed.[254] Thus an ironclad statement that "Congress shall make no law . . . abridging the freedom of speech . . . " is obligatory and has been the basis for the high wall of protection separating the people of the United States from the government overreach that we see in Canada, Britain, and Europe generally.[255] In America there is no balancing of speech with an amorphous understanding of human dignity or democratic ideals.[256] First Amendment scholar Professor Harry Kalven Jr.[257]explains that only when words themselves become nearly synonymous with violence itself, will censoring those words ever be considered legitimate.[258] He states:

> We reach here the ultimate battleground for free speech theory—the area in which the claims of censorship are at once most compelling and most dangerous to key values in an open society. The case for speech is that it is, in a profound sense, *the* alternative to force as a way of changing

249. *See supra* Part I.

250. *Id.*

251. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119–21 (Jamie Kalven ed., 1988).

252. Public Order Act, *supra* note 215; Canadian Human Rights Act, *supra* note 142.

253. *See supra* Part I.

254. *See generally* Jay, *supra* note 28, at 774.

255. U.S. CONST. amend. I.

256. *See generally* Whittaker, *supra* note 238.

257. Prof. Harry Kalven was a professor of law at the University of Chicago from 1946–1974.

258. KALVEN, *supra* note 251, at 119–20 (quoting JOHN STUART MILL, ON LIBERTY 67–68 (1956)).

> men's actions. The question is: Does speech at some point become so closely linked to force that we perceive it as the exercise of force? The commonplace answer has always been "yes," and there has always been general agreement that at some point of proximity to violent action words can be reached by law. Indeed, even so ardent a champion of free speech as John Stuart Mill conceded that his theory would permit punishing the statement that corn dealers are starvers of the poor "when delivered orally to an excited mob assembled before the house of a corn dealer."[259]

Kalven contends that the central issue of the American free speech tradition is the "fundamental tension between the principle that seditious libel cannot be proscribed by law and the common sense of stopping free speech at the boundary of incitement to crime."[260] Regarding free speech jurisprudence in the United States, he states: "Finally, my personal view is that speech is 'almost absolute.'"[261] The emphasis should always be on "absolute," and this guarantee of free and nearly unfettered speech is the principle upon which the modern American society has coalesced.[262] However, this principle cannot be taken for granted in a world where United Nations Secretary General Ban Ki-moon has stated "that 'when some people use this freedom [of speech] to provoke or humiliate . . . others' values and beliefs, . . . this cannot be protected.'"[263] He was referring to a video that appeared on YouTube titled "Innocence of Muslims."[264] This dangerous but spreading viewpoint that allows suppression of speech based on other's values, notwithstanding America's absolutist free speech tradition, may eventually usurp this absolutist tradition. Professor Turley writes:

> A willingness to confine free speech in the name of social pluralism can be seen at various levels of authority and government. In February, for instance, Pennsylvania Judge Mark Martin heard a case in which a Muslim man was charged with attacking an atheist marching in a Halloween parade as a "zombie Muhammad." Martin castigated not

259. *Id.*
260. *Id.* at 120.
261. *Id.* at xxii.
262. *See* Fiss, *supra* note 49, at 2087–88.
263. Turley, *supra* note 3.
264. *Id.*

> the defendant but the victim, Ernie Perce, lecturing him that "our forefathers intended to use the First Amendment so we can speak with our mind, not to piss off other people and cultures—which is what you did."[265]

This Pennsylvania judge captures the dangers of the European Model. If a society bases its free speech limits on the right of other people or cultures "not to be offended or insulted," then free speech has no discernible boundary by which a government must abide.[266] Thus free speech is no longer a certainty.

At least one influential member of the American media has noted approval of Canada's free speech model.[267] Linda Greenhouse, a 1998 Pulitzer Prize winning writer, the Supreme Court reporter for The New York Times from 1978 to 2008, and teacher at Yale Law School, wrote:

> Earlier this month, the American Bar Association traveled north to Toronto for its annual meeting. Doing some homework for a panel I was to moderate, I came upon section 1 of the Canadian Charter of Rights and Freedoms, added in 1982 to the country's mid-19th century constitution. Section 1, the "limitation clause," makes the Charter's many guarantees subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A Canadian judge assured me that this requirement of "proportionality," as various European constitutions with a similar principle refer to it, is invoked constantly and forms the basis for Canadian constitutional interpretation. Proportionality strikes me as worth considering in preference to the arid absolutism that seems to have taken hold of the United States Supreme Court.[268]

One person's free speech is another person's "arid absolutism." The issue for the future is whether the American Absolutist Model is secure or whether the European Model will inexorably creep into American free speech jurisprudence. This Article has documented the repression that Canadians and British citizens endure—Canadians with their Star Chamber-type tribunals, and the British

265. *Id.*

266. *See generally* WALKER, *supra* note 50, at 2–3.

267. Linda Greenhouse, Op-Ed., *Over the Cliff*, OPINIONATER, N.Y. TIMES (Aug. 24, 2011, 9:00 PM), http://opinionator.blogs.nytimes.com/2011/08/24/over-the-cliff/.

268. *Id.*

who are subject to arrest and punishment based on a mere "insulting language" standard.[269] Both countries are attempting a balancing act between free expression and the amorphous and seductive ideas of human dignity, equality, and democratic government. It is difficult to oppose the ideas of human dignity, equality, and democratic government. These are ideas which on their face are to be applauded, but in their application, have led to repression and injustice, serving as openings for control and censorship by "free" Western democratic governments.

Which system would you rather live under? Freedom demands the American Absolutist Model.

269. Public Order Act, *supra* note 215; Baklinski & Jalsevac, *supra* note 168.